



January 16, 2002

Mr. John Feldt
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2002-0273

Dear Mr. Feldt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157395.

The Denton County District Attorney's Office (the "district attorney") received a request for the district attorney's file regarding a specified criminal cause of action. You state that you have released public court records contained within the district attorney's file, as well as a redacted copy of the Lewisville Police Department case report. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, 552.111, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

You contend that the information submitted in Exhibits D, E, and F is excepted under subsections 552.108(a)(3)(A), (a)(3)(B), (b)(3)(A), and (b)(3)(B). Please note that former subsections 552.108(a)(3)(A) and (a)(3)(B) were renumbered as subsections 552.108(a)(4)(A) and (a)(4)(B) by the Seventy-seventh Legislature, effective September 1, 2001. *See* Act of May 17, 2001, 77th Leg., R.S., H.B. 776, § 6 (to be codified at Gov't Code § 552.108). These subsections provide that information held by a law

¹ In your initial brief to this office, you claim that the requested information is also excepted from required public disclosure under section 552.103 of the Government Code. In your brief dated November 16, however, section 552.103 is no longer claimed. Therefore, you have waived any claim of exception from disclosure under section 552.103 of the Government Code. Gov't Code §§ 552.301, .302.

enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state [and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

You assert that Exhibits D, E, and F are attorney work product prepared by the state in anticipation of, or in the course of, preparing for criminal litigation. You argue that this information reveals the mental impressions and legal reasoning of the state's attorney. The court in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), held that a discovery request for a district attorney's entire litigation file may be denied because the decision of what to include in the file necessarily reveals the prosecutor's mental impressions or legal reasoning. However, you indicate that the district attorney has released some of the documents contained in Exhibits E and F. Therefore, you do not seek to withhold the entire file. As a result, you may not withhold the information under *Curry*, and you must demonstrate how the documents are excepted under section 552.108(a)(4) or 552.108(b)(3).

You advise that Exhibit D consists of information prepared by the attorneys representing the state, and that Exhibits D, E, and F contain internal records and notations of the prosecutors that reflect their mental impressions and reasoning. After reviewing the submitted information, we conclude that you may withhold the information in Exhibit D and the plea

recommendation in Exhibit E pursuant to section 552.108(a)(4) of the Government Code. We note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Based on your representations, however, we conclude that you have released such basic information. Because the remaining information in Exhibit E has been released, you may not withhold this information under section 552.107, 552.108, or 552.111, and it must be released to the requestor. Further, the information in Exhibit F was not prepared by an attorney, and the district attorney has not adequately explained how the information reflects the mental impressions of the prosecutor. Therefore, we conclude that you may not withhold Exhibit F under section 552.108(a)(4) or 552.108(b)(3).

We now address your other arguments for the information in Exhibit F. You claim that the submitted documents are work product excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "[a]n interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See* Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See id.* at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You argue that the information at issue consists of internal records and notations of prosecutors prepared and maintained for their internal use. However, you have not explained how the information in Exhibit F tends to reveal the prosecutor's mental processes and therefore, it may not be withheld under section 552.111.

You also argue that Exhibit F is excepted under section 552.108(a)(1) and (b)(1). Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Section 552.108(b) states that an internal record or notation of a law enforcement agency that is maintained for internal use in matters relating to law enforcement is excepted from required public disclosure if release of the internal record or notation would interfere with law enforcement. Gov't Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex*

parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You fail to explain how release of the information would interfere with the detection, investigation, or prosecution of crime. As a result, we conclude that you may not withhold Exhibit F under section 552.108(a)(1) or 552.108(b)(1).

Finally, you argue that some information contained in Exhibit F is excepted from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990); *see* 28 C.F.R. § 20.21(c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Accordingly, we have marked the information that must be withheld under section 552.101 of the Government Code.

Exhibit F also contains an accident report. Section 550.065 of the Transportation Code governs the release of Texas peace officer's accident reports completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Texas Department of Public Safety or another governmental entity is required

to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* Because the requestor has not provided the required information, the district attorney must withhold the accident report under section 552.101 in conjunction with section 550.065 of the Transportation Code.

In addition, a social security number contained in Exhibit F may be excepted from required public disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Therefore, prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the county pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, section 552.130 excepts from public disclosure information relating to a driver's license issued by an agency of this state. Thus, you must withhold the driver's license numbers in Exhibit F under section 552.130.

In summary, you may withhold the information in Exhibit D and the plea recommendation in Exhibit E under section 552.108. You must withhold the CHRI that we have marked and the accident report in Exhibit F under section 552.101, and the driver's license numbers in Exhibit F under section 552.130. You must withhold the social security number in Exhibit F if it was obtained or is maintained by the county pursuant to any provision of law enacted on or after October 1, 1990. You must release the remaining requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

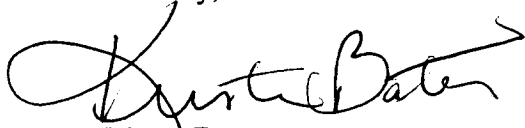
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a long horizontal flourish extending to the right.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 157395

Enc. Submitted documents

c: Mr. Jim S. Adler
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(w/o enclosures)